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No. 07-159

In the Supreme Court of the United States

CITY OF NEWPORT NEWS, VIRGINIA; DENNIS A. MOOK,

Petitioners,

v.

CHRISTOPHER A. SCIOLINO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

When a public employer fires an employee for false and stigmatizing reasons and is likely to make its accusations known to the former employee's prospective employers, must the former employee wait for actual disclosure to occur in order to invoke his due process right to contest the false allegations?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

A. Proceedings In The District Court

Respondent Christopher A. Sciolino, a probationary police officer, was fired by petitioner City of Newport News without being given an opportunity to respond to allegations that he had tampered with a patrol car odometer. Pet. App. 60a. Sciolino sued the City and its police chief under 42 U.S.C. § 1983, asserting that they denied him due process by firing him and making these stigmatizing allegations without affording him any opportunity to clear his name. Sciolino invoked this Court's decisions in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), *Paul* v. *Davis*, 424 U.S. 693 (1976), and *Bishop* v. *Wood*, 426 U.S. 341 (1976), which held that the Due Process Clause, U.S. Const. Amend. XIV, requires public employers, when taking actions that seriously affect an individual's ability to make a living, to afford the employee a name-clearing hearing. Sciolino alleged that he had not received any opportunity to clear his name; that the odometer-tampering accusations were false; that they "impugned his good name, honor, reputation, and integrity"; and that the accusations were in the "public record." Pet. App. 57a-58a; see also Pet. App. 57a (alleging that the letter terminating his employment for "deliberate destruction * * * of city property" had been "circulated to various individuals" and placed in a personnel file that "may be available to prospective employers and the public at large").

The district court granted petitioners' motion to dismiss. Explaining that the due process right recognized in *Roth* and *Bishop* is limited to cases where an accusation (a) is made in connection with termination or serious demotion; (b) is false;

(c) imposes a "stigma or other disability that prevent[s the plaintiff] from engaging in other employment"; and (d) is made public, see Pet. App. 39a-40a (citing, *inter alia*, *Roth*, 408 U.S. at 573-575; *Bishop*, 426 U.S. at 348-349; and *Paul*, 424 U.S. at 710-711), the district court focused primarily on whether the complaint adequately pleaded the last of those requirements.

The court observed that the Fourth Circuit's leading decision on the subject, *Ledford* v. *Delancey*, 612 F.2d 883 (4th Cir. 1980), was "not precisely clear" as to whether it was enough to show that accusations were "likely" to be disseminated or, as petitioners maintained, that the right attached only in cases where dissemination of the false assertion had already "actually" occurred. Pet. App. 42a. After considering the parties' arguments and surveying decisions of other courts, the district court determined that the intermediate "likelihood" standard was the widely prevailing approach, Pet. App. 41a, and concluded that it "applies in the Fourth Circuit," Pet. App. 45a.

Because the district court believed both that the complaint alleged only that the police department "*might* * * * show his termination letter to some future prospective employer," Pet. App. 48a, and that Virginia privacy laws would in fact protect against such disclosure, it held that Sciolino did not establish a likelihood of disclosure, Pet. App. 46a. Accordingly, the district court dismissed the complaint for failure to state a claim upon which relief could be granted. Pet. App. 47a-48a.[1]

Sciolino then sought leave to file an amended complaint and moved to alter the judgment, maintaining that he could meet the "likelihood" standard because police agencies in the

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[1] The district court "decline[d] to reach the question of whether the charges * * * imply serious character defects and therefore stigmatize Plaintiff." Pet. App. 48a.

Hampton Roads region had a practice of sharing information about job applicants. Pet. App. 52a. The district court denied both motions on the ground that the evidence supporting the new allegations had been available before the entry of the original judgment. Pet. App. 52a-53a.

B. Proceedings In The Court Of Appeals

Sciolino appealed to the Fourth Circuit, which affirmed the district court's dismissal of the complaint as legally insufficient, Pet. App. 12a, but ruled that the district court should have granted Sciolino the opportunity to amend, Pet. App. 12a-14a.

The Fourth Circuit largely endorsed the district court's analysis of the due process issue. The panel's opinion began by turning aside the City's argument that the charges against Sciolino were not sufficiently stigmatizing. The City's charge that "Sciolino falsely advanced the odometer, thus deliberately destroying city property," it noted, "implies the existence of serious character defects." Pet. App. 5a n.2 (citation omitted).

The court then turned to what it described as the "only element seriously at issue" on appeal – whether the charges were "made public." Pet. App. 5a. It noted that the district court's likelihood-of-dissemination standard fell between the position advanced by Sciolino – that liability attaches where the personnel file *may* be the subject of inspection by prospective employers – and the view urged by the City – that "a specific incident of 'actual publication'" must have occurred. Pet. App. 5a-6a (citation omitted). Rejecting the parties' conflicting claims that *Ledford* and *Bishop* "dictate the standard [each side] espouses," Pet. App. 6a, the Fourth Circuit noted that this "Court has provided helpful guidance as to what the Due Process Clause requires," Pet. App. 9a. It then rejected the "may be available" standard out of concern that it would allow suit in cases where "the plaintiff would be

unlikely to be deprived of future employment or to have his reputation tarnished," giving insufficient weight to *Bishop*'s admonitions that the Constitution does not protect against all "'incorrect or ill-advised personnel decisions'" and "should not 'penalize forthright and truthful communication between employer and employee.'" Pet. App. 9a (quoting *Bishop*, 426 U.S. at 350).

The court also saw an "actual publication" limitation as "contrary to the requirements of the Fourteenth Amendment," citing three principal reasons. Pet. App. 9a. First, it would present employees with a harsh dilemma: They would have to "choose between finding future employment and protecting [their] reputation[s] by not applying for jobs (and thus not risking the release of the stigmatizing allegations)." Pet. App. 10a. Second, the name-clearing hearing would come too late: "If an allegation of actual dissemination were required, the information would have already been communicated to a potential employer, the employee's job opportunities foreclosed, and his reputation damaged *before* any possibility for a name-clearing hearing." *Ibid.* Third, "a requirement that an employer need only provide a name-clearing hearing if it actually disseminates the employee's personnel file to a specific prospective employer would be virtually impossible to enforce." *Ibid.* "Most job applicants," the Fourth Circuit noted, "will never know whether a prospective employer decides against hiring them because of false damaging charges in a personnel file, or for other reasons, and would not even know if the prospective employer has learned of the charges." Pet. App. 10a-11a.

Having held that the district court had "selected the appropriate standard," Pet. App. 11a, the Fourth Circuit affirmed its dismissal of Sciolino's complaint. The court of appeals agreed that the complaint did not allege "a likelihood that prospective employers * * * or the public at large [would] inspect [Sciolino's] file," Pet. App. 11a; rather, the

complaint alleged "only that his file with the charges 'may be available to prospective employers,'" Pet. App. 12a. The Fourth Circuit observed that a plaintiff could meet this standard in one of two ways:

> First, the employee could allege (and ultimately prove) that his former employer has a practice of releasing personnel files to all inquiring employers. Second, the employee could allege that although his former employer releases personnel files only to certain inquiring employers, that he intends to apply to at least one of these employers. In either case, he must allege that the prospective employer is likely to request the file from his former employer.

Pet. App. 11a. Such a standard, the Court explained, "protects the employee's constitutional liberty interests but does not unduly interfere with the employer's personnel administration [and] imposes no enormous costs." Pet. App. 11a-12a.

Although it approved the district court's adoption of the likelihood test and the application of that test to Sciolino's complaint, the court of appeals reversed the district court's order denying leave to amend. Federal Rule of Civil Procedure 15(a) allows amendment, the court of appeals observed, except when it would be prejudicial, in bad faith, or futile, and none of those exceptions applied. Pet. App. 13a. In particular, the court of appeals noted that amendment would not be futile because the proffered amended complaint alleged a City "practice" of disseminating "former employees' personnel files to [l]ocal and regional police departments." *Ibid.* (citation omitted). Accordingly, the court of appeals remanded the case for further proceedings.

The court of appeals declined to address the City's two alternative arguments in favor of affirmance. First, the City had argued that a meeting between the chief of police and

Sciolino before his discharge satisfied any due process requirements. Pet. App. 4a n.1. The court of appeals, however, left that issue for the district court to decide, explaining that "[t]he record in this case is not sufficiently developed to make this sort of evaluation." *Ibid.* Second, the City had argued that it was entitled to judgment under *any* disclosure standard because Virginia law specifically prohibited police agencies from sharing personnel files in these circumstances. Appellee's C.A. Br. at 19-20. The Fourth Circuit explained that this argument had been complicated, if not contradicted, by statements in the City's appellate briefs and oral argument indicating that the City *would* make accusations known to prospective employers in certain "high liability situation[s]." Pet. App. 6a n.3. In light of those indications that release to prospective employers was both "legally authorized" and the City's "practice * * * in some circumstances," the court concluded that this issue too should be resolved by the district court in the first instance. *Ibid.*

Judge Wilkinson dissented from the portion of the decision allowing Sciolino to proceed under the "likelihood" standard. He criticized the court's refusal to embrace an actual dissemination requirement, asserting that the requirement followed directly from *Bishop.* Pet. App. 23a-24a. Judge Wilkinson repeatedly characterized the majority opinion as holding "that a document in a government file drawer can violate a constitutional liberty interest." Pet. App. 17a; see also Pet. App. at 20a, 23a, 25a, 26a. By allowing discharged employees to seek name-clearing hearings where communication of false and stigmatizing accusations was likely, the dissent asserted, the court had "transform[ed] the Due Process Clause," Pet. App. 31a, and "federalize[d] myriad aspects of the local employment relationship without any pretense of democratic sanction," Pet. App. 23a. See also Pet. App. 26a (criticizing majority for selecting "particular procedural safeguards * * * in the abstract and for all time");

Pet. App. 28a (describing the court's rule as "amorphous"). Judge Wilkinson also disagreed with the court's analysis of Rules 15 and 59, asserting that the district court did not abuse its discretion in determining that "interests of finality" outweighed Sciolino's right to amend his complaint after the judgment. Pet. App. 34a n.13.

The Fourth Circuit denied the City's petition for rehearing en banc with no judge – not even Judge Wilkinson – requesting a poll. Pet. App. 55a. Judge Wilkinson, however, favored panel rehearing. *Ibid.*

REASONS FOR DENYING THE PETITION

This case not only arises in an interlocutory posture, but also comes to this Court at an extremely early stage of the litigation. Indeed, all the Fourth Circuit held is that respondent should be given leave to file an amended complaint. The court of appeals, moreover, left open defenses that, if sustained, could allow the City to prevail on remand at an early stage. As a result, it is not yet known whether the legal rule about which petitioners complain will make any difference in this case. No less important, the record here is grossly inadequate to inform this Court's consideration of the still-abstract legal question. For example, the district court has yet to receive testimony concerning petitioners' employment practices or how they square with those in other jurisdictions, nor have the courts below definitively resolved whether state law moots this controversy (or future cases) by mandating a particular treatment of government employees. Those are precisely the sorts of things this Court should know before deciding the underlying constitutional issue, perfectly illustrating why this Court routinely denies review of cases in this highly preliminary posture.

This Court should be particularly wary of wading into this issue at such an early juncture because the only true conflict

among the circuits is wafer-thin. As discussed below, only the Seventh Circuit actually follows a rule inconsistent with the decision below. The Seventh Circuit is in longstanding conflict with a number of other courts, yet this Court (at the urging of, among others, the City of Chicago) has denied review of several petitions raising that conflict. *E.g.*, *Olivieri* v. *Rodriguez*, 522 U.S. 1110 (1998) (No. 97-927). The conflict rarely makes any practical difference to governmental employers, it was tolerable in 1998, and it is tolerable now. Even if there were a reason for this Court suddenly to take an interest in this issue, this factually undeveloped and interlocutory case would present a poor vehicle. Certiorari should be denied.

I. THE OVERWHELMING MAJORITY OF FEDERAL COURTS OF APPEALS AGREE THAT ACTUAL DISSEMINATION IS NOT REQUIRED

Petitioners primarily claim that there exists a deep, wide, and significant conflict between the decision below and those of other state and federal courts that requires this Court's review of the Fourth Circuit's interlocutory decision. Pet. 12-13. Their claim is wildly overstated.

First, there is no disagreement between the Fourth Circuit and other courts on the issue upon which this case actually was decided: The decision below held unequivocally that mere placement of stigmatizing information in a personnel file would *not* give rise to a due process claim. Pet. App. 9a. Indeed, the Fourth Circuit affirmed the district court's 12(b)(6) dismissal on this ground. *Ibid.* Thus, in the Fourth Circuit no less than in the Seventh, the Due Process Clause does not entitle a terminated probationary employee who alleges only that false and stigmatizing accusations have been placed in a government "file drawer," Pet. App. 17a (dissenting opinion), to a name-clearing hearing, see Pet. App. 9a, 14a n.8.

More important, petitioners overstate the degree (and resulting burdens, see pp. 15-18, *infra*) of any conflict as to whether due process requires a name-clearing hearing when public disclosure of false and stigmatizing charges is "likely" – or even "certain" – unless and until the reputational "time bomb" has exploded. Although petitioners correctly read the Seventh Circuit as having closed a door that the decision below left slightly ajar, petitioners' claims that other federal and state courts have committed themselves to the Seventh Circuit's absolute rule do not withstand scrutiny.

For starters, the First Circuit has *not* committed itself to the Seventh Circuit's view that prior disclosure is always required. Although *Burton* v. *Town of Littleton*, 426 F.3d 9, 17 (1st Cir. 2005), does state that "the placement of damaging information in a personnel file, without further dissemination, is not sufficient to trigger the constitutional tort," the same opinion declares that it "would be a different case" if state law subjected personnel files to public disclosure. *Id.* at 17 n.6. In recognizing that a name-clearing claim might proceed when stigmatizing charges have been placed in a *publicly available* personnel file – *i.e.*, in the absence of actual, active dissemination – the First Circuit joins many courts petitioners acknowledge are in line with the Fourth Circuit's view. See, *e.g.*, *Brandt* v. *Board of Coop. Educ. Servs.*, 820 F.2d 41, 44-45 (2d Cir. 1987) (distinguishing situations where information is "kept private" from those where information is "likely" to be accessible to employers) (cited at Pet. 17); *Buxton* v. *Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989) (public nature of records means publication occurs at time of filing) (cited at Pet. 18).

Nor is the Third Circuit's decision in *Copeland* v. *Philadelphia Police Department*, 840 F.2d 1139 (1988) (cited at Pet. 15), in conflict with the decision below. In *Copeland*, the court rejected the plaintiff's claim of entitlement to a name-clearing hearing, but the plaintiff had not alleged that

dissemination was likely or that it was the employer's regular practice to release personnel files. "He merely allege[d] that the presence of information relating to his termination in his personnel file *raise[d] an inference* that the city intend[ed] to communicate this information to prospective employers." *Id.* at 1148 (emphasis added). *Copeland* thus held that the plaintiff had failed "to produce the evidence necessary to support his assertion that the city violated his liberty interest" in that particular case, not that due process mandates proof of actual dissemination in all cases. *Ibid.* Indeed, a post-*Copeland* district court decision explicitly read Third Circuit law as incorporating the likelihood-of-dissemination standard. See *Mattia* v. *Delaware River Port Auth.*, No. CIV.A. 95-4281, 1996 WL 532487, at *7 (E.D. Pa. Sept. 20, 1996) ("[A] plaintiff has demonstrated dissemination if s/he can show that prospective employers are likely to gain access to his or her personnel file.").

The state court decisions petitioners cite only belie their claim that their approach has many adherents. As petitioners implicitly acknowledge (Pet. 16), the language quoted from the intermediate appellate court decision in *Cartwright* v. *Wilbanks*, 541 S.E.2d 393 (Ga. Ct. App. 2000), dealt only with the elements of a state-law libel claim, and the New York case they cite as "follow[ing] the * * * Seventh Circuit," Pet. 12 (citing *Swinton* v. *Safir*, 720 N.E.2d 89 (N.Y. 1999)), explicitly *adopted* the likelihood-of-disclosure standard for plaintiffs seeking injunctive or declaratory relief. See 720 N.E.2d at 93 ("We conclude that * * * where the discharged employee is seeking * * * expungement of stigmatizing material in a personnel file * * * a likelihood of dissemination is sufficient to trigger one's right to a departmental name-clearing hearing."). Nor do the Iowa and Minnesota decisions petitioners cite adopt an actual-dissemination standard. *Simonson* v. *Iowa State University*, 603 N.W.2d 557 (Iowa 1999) (cited at Pet. 15), held only that "'[l]iberty interests are not violated by the private disclosure of reasons for discharge

from public employment.'" *Id.* at 564 (quoting *Poynton* v. *Special Sch. Dist.*, 949 F. Supp. 1407, 1414 (E.D. Mo. 1996)). *Phillips* v. *State*, 725 N.W.2d 778 (Minn. Ct. App. 2007) (cited at Pet. 15), did not involve stigmatizing information in an employee's personnel file. Neither court considered, let alone rejected, a claim that likely dissemination of a personnel record including stigmatizing accusations would give rise to a name-clearing right.

At the same time, petitioners' attempt to foster the appearance of conflict obscures the overwhelming weight of the decisional authority arrayed against the Seventh Circuit's idiosyncratic rule. In vast numbers, state and federal courts throughout the country – from decisions contemporaneous with *Bishop* v. *Wood*, 426 U.S. 341 (1976), through the present – have not limited the name-clearing right to post-disclosure situations. Thus, petitioners admit (as they must) that the Second, Fourth, Ninth, Tenth, and Eleventh Circuits recognize due process claims where false and stigmatizing information is likely to be disclosed to prospective employers. Pet. 16-19. But petitioners fail to acknowledge that the Fifth, Sixth, Eighth, and D.C. Circuits also do not require prior dissemination.

For example, in *Med Corp.* v. *City of Lima*, 296 F.3d 404 (6th Cir. 2002), the Sixth Circuit made clear that prior dissemination is not necessary to a name-clearing claim. In that case, an ambulance company alleged that the city had violated due process by suspending it from receiving 911 dispatches based on reports of official investigations. While rejecting the claim, the court stated that the company had not "pointed to any * * * evidence in the record suggesting that the City's allegations have been *or will be* publicly disclosed," *id.* at 415 (emphasis added), acknowledging that evidence of likely dissemination would be sufficient. See *id.* at 414 (inquiry should be keyed to whether the city's

accusations "would foreclose [the company's] ability to seek future business opportunities").

The D.C. Circuit also rejects the notion that actual dissemination is a necessary requirement of a name-clearing claim. In *Mazaleski* v. *Treusdell*, 562 F.2d 701 (D.C. Cir. 1977), a terminated federal employee alleged that his employer violated due process by not allowing him to challenge certain reports that led to his firing. The court rejected his claim on the ground that the reasons for which he was fired did "not * * * touch a liberty interest." *Id.* at 714. In discussing the public dissemination requirement, the D.C. Circuit stated that "[o]f course, where the government publicly disseminates information concerning its adverse personnel actions, *or where it simply makes certain information available to prospective employers*, a court must proceed to determine whether the information disclosed is of such a derogatory nature as to infringe a liberty interest of the employee." *Id.* at 712 (emphasis added). The D.C. Circuit thus treats making information "available" as equivalent to actual disclosure.

Despite petitioners' arguments to the contrary (Pet. 19-20), the Fifth and Eighth Circuits also have held that actual dissemination is not necessary to make out a due process name-clearing claim. The Fifth Circuit has clearly held that due process claims may be brought where false and stigmatizing allegations have not yet been publicly disseminated but where the accusations have been included in a personnel file likely to be disclosed to prospective employers. In *Ortwein* v. *Mackey*, 511 F.2d 696 (5th Cir. 1975), the court held that "infringement of one's liberty interest can be found only where the governmental agency has made or *is likely to make* the allegedly stigmatizing charges public." *Id.* at 699 (emphasis added). In *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983), the court reaffirmed this standard: "To prove deprivation of * * * a liberty

interest, a public employee must show that his employer 'has made *or is likely to make* the allegedly stigmatizing charges public.'" *Id.* at 796 n.6 (emphasis added) (citing *Ortwein*, 511 F.2d at 699). Contrary to petitioners' assertions, the Fifth Circuit did not retreat from this understanding when deciding *Hughes* v. *City of Garland*, 204 F.3d 223 (5th Cir. 2000). The dispute in *Hughes* was not over the proper legal standard but over whether the plaintiff had met either the actual-disclosure or likelihood standard. First, the court rejected plaintiff's argument of actual disclosure because dissemination could not be fairly attributed to the city. *Id.* at 227-228. Then, the court rejected the plaintiff's argument that other false and stigmatizing materials "[we]re likely to be disclosed" because state law and city policy foreclosed the possibility. Citing the above-quoted footnote in *Selcraig*, the Fifth Circuit "conclude[d] that the *mere* presence of [stigmatizing materials] in [the employee's] personnel file is insufficient to create a triable issue on the public disclosure element of her claim." *Id.* at 228 (emphasis added). That statement of the law, of course, echoes the Fourth Circuit's conclusion in this case.

Petitioners' effort to extract an "intracircuit split" from the Eighth Circuit's cases is no more convincing. In *Clark* v. *Mann*, 562 F.2d 1104 (8th Cir. 1977), that court held that proof that stigmatizing information "would be available to prospective employers" was sufficient to qualify as "public disclosure" for a due process name-clearing claim. *Id.* at 1116. The necessary implication of that decision – that actual dissemination is not a necessary requirement – was fortified by *Hogue* v. *Clinton*, 791 F.2d 1318 (8th Cir. 1986), which recognized that maintaining a personnel file replete with allegations of wrongdoing "may be a sufficient publication if the defendants made the file available to prospective employers." *Id.* at 1323 n.7. In so holding, the court cited with approval *Bailey* v. *Kirk*, 777 F.2d 567 (10th Cir. 1985), which had allowed a due process claim to proceed without

proof of actual dissemination. The court's decision in *Raposa* v. *Meade School District*, 790 F.2d 1349 (8th Cir. 1986), did not unsettle Eighth Circuit law on this point. In *Raposa*, which was decided shortly *before Hogue*, the court did not squarely address the proper standard for adjudging whether allegedly false stigmatizing information has been "made public." Instead, the court rejected the plaintiff's claim on the ground that the statements at issue were not sufficiently "stigmatizing" to raise due process concerns. *Id.* at 1354. Subsequent district court decisions within the Eighth Circuit have consistently noted that a claim can arise from an employment file being made available to prospective employers, even in the absence of actual dissemination. See, *e.g.*, *Brass* v. *Incorporated City of Manly*, No. C02-3004-PAZ, 2003 WL 1907158, at *7 (N.D. Iowa Apr. 17, 2003); *Poynton*, 949 F. Supp. at 1414.[2]

A strong working consensus has emerged among the courts of appeals that proof of actual dissemination is not required to meet the public disclosure element of a name-clearing claim. It recognizes that the focus of the public disclosure inquiry is the potential foreclosure of future employment opportunities. Petitioners greatly exaggerate the nature and the degree of any differences among the courts of appeals. Only the Seventh Circuit has unambiguously adopted an actual-dissemination requirement; all of the other courts of appeals have either recognized that a due process claim can proceed in the absence of actual dissemination or have stopped short of embracing petitioners' view. This is not the sort of conflict that calls out for this Court's attention.

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[2] In any event, if there are genuine (if minute) differences among decisions within the Fifth and Eighth Circuits, litigants have a ready means of obtaining a definitive resolution. See 5th Cir. R. 35 (determination of causes by the en banc court); 8th Cir. R. 35A (hearing and rehearing en banc); see also R. Stern *et al.*, *Supreme Court Practice* § 4.6 (8th ed. 2002).

II. PETITIONERS SIGNIFICANTLY OVERSTATE THE BURDENS THE DECISION BELOW WOULD PLACE ON GOVERNMENTAL EMPLOYERS

Even less plausible than petitioners' claim of widespread decisional conflict are their efforts to portray the issue as highly consequential for governmental employers. While the petition, echoing the dissenting opinion below, insists in heated terms that the difference between the Fourth and Seventh Circuit's application of the *Roth/Bishop* rule is of broad import to public employers, the reality is to the contrary. Whatever daylight may exist between the two courts' approaches as a formal matter, the practical significance for employers is truly *de minimis*.

Notably, for all the high-pitched rhetoric petitioners borrow from the dissent below – see, *e.g.*, Pet. 9, 22 (accusing court of "do[ing] violence to our constitutional text and reorder[ing] our constitutional structure") – the reality is that not a single judge of that court (not even the author of the dissenting opinion) responded to petitioners' call for rehearing en banc. See 4th Cir. R. 35(a). Whether the lack of judicial interest in plenary reconsideration reflects an appraisal of the decision's correctness, a judgment about the issue's practical effects on governmental employers, the case's interlocutory posture, see pp. 23-26, *infra*, or some combination thereof, these same factors bear on this Court's exercise of its discretionary certiorari jurisdiction. See S. Ct. R. 10.

Petitioners' dire forecasts about the consequences they will suffer under the Fourth Circuit's rule ring hollow, considering that the rule adopted is at best a restatement of *existing* Fourth Circuit law on the subject. The last time that court addressed the issue, *twenty-seven years ago*, in *Ledford* v. *Delancey*, 612 F.2d 883 (4th Cir. 1980), its opinion indicated that liability could be imposed when stigmatizing

information "may be the subject of inspection by prospective employers." *Id.* at 886. Whether or not that was the *holding* of that decision – and whether it is the only or best reading of *Bishop* – may be debatable, but it is not arguable that the decision below (which is arguably even more favorable toward employers) will open floodgates or trample on federalism principles. Tellingly, neither cataclysm seems to have occurred in the quarter-century when *Ledford* was the law governing the five States of the Fourth Circuit. For all petitioners' unsubstantiated assertions, it is implausible that the decision below will work any sea change in the way that local governments in the circuit operate their personnel practices.

Nor is there any reason to believe that the Fourth Circuit is idiosyncratic in this regard. The issue that petitioners claim presents a "sharp conflict" that "mock[s] the clarity" to which the law aspires (Pet. i) can hardly be of critical importance to governmental employers. Both the Fourth Circuit and the Seventh Circuit recognize the employee's entitlement to a name-clearing hearing. The *only* difference is that the Seventh Circuit requires him to wait "until the time bomb explodes," *McMath* v. *City of Gary*, 976 F.2d 1026, 1035 (7th Cir. 1992), while the Fourth Circuit (along with nearly every other federal and state court, see pp. 8-14, *supra*) allows an employee to enforce his right when he can show that harmful disclosure is "likely" – *e.g.*, where, as here, the ticking time bomb (false accusations in a public record) is already limiting his ability to pursue employment. Although public employers may prefer the option of deferring their constitutional duties until the last possible moment in the hope that many violations will go undiscovered or grow stale, that desire hardly warrants this Court's review.

And, of course, not every case will turn on the "actual" versus "likely" disclosure question, so petitioners cannot credibly claim that denying review (or awaiting a proper

vehicle to consider the question) would doom them to substantial liability or injury.[3] Moreover, this particular legal rule does not matter to a probationary employee who receives an opportunity to clear his name as a result of a collective bargaining agreement, of state law, of state constitutional law, or of sound employment practice. Nor does it have any practical significance where the public employer follows a rule of nondisclosure as a matter of either state law or policy. Thus, the City of Chicago, a large government employer within the Seventh Circuit, has noted that "[a]t most, public employers in circuits that have rejected the Seventh Circuit's approach need only adopt procedures designed to ensure that no adverse information about a former employee is communicated to prospective employers." Br. in Opp. at 7, *Olivieri* v. *Rodriguez*, cert. denied, 522 U.S. 1110 (1998) (No. 97-927), 1997 WL 33557381. Chicago went on to explain that:

> it is unclear that the practical significance of requiring employers either to provide name-clearing hearings or to refuse to share information from their personnel files is so great as to warrant [the Supreme Court's] intervention. * * * Indeed, many employers—

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[3] Courts recognize that a plaintiff must show that the government employer (1) made charges against the employee (2) in conjunction with a termination or demotion that were (3) stigmatizing and (4) false and (5) would make finding future employment difficult, if not impossible; and that (6) the stigmatizing charges must have been made public; and (7) that the employer must have denied the plaintiff an opportunity to clear his name. See Pet. App. 4a-5a. As the decided cases make clear, these other elements often pose a higher obstacle for plaintiffs than does any version of the publication requirement. See, *e.g.*, *Stretten* v. *Wadsworth Veterans Hosp.*, 537 F.2d 361, 365-366 (9th Cir. 1976) (inability to perform satisfactorily and unwillingness to deal with coworkers professionally does not preclude future employment opportunities); *Freeman* v. *Poling*, 338 S.E.2d 415, 423 (W. Va. 1985) (unexplained termination or discharge from employment does not create sufficient stigma to invoke liberty interest protection); see also *Copeland* v. *Philadelphia Police Dep't*, 840 F.2d 1139, 1144-1146 (3d Cir. 1988) (plaintiff's hearing was "sufficient to fulfill the due process requirement").

> including the City of Chicago—routinely refuse to provide any information about former employees other than to confirm dates of employment, precisely to avoid litigation.

Id. at 8.

Thus, petitioners' strident appeals to "policy" and abstract principle are untethered to observable real-world experience in the decades since *Roth* and *Bishop*. In fact, it is far from clear that – even in a world where all decisions and policies were driven *exclusively by the desire to avoid federal constitutional litigation* – well-meaning employers would respond dramatically differently to the Fourth and Seventh Circuit rules. On the contrary, while the Seventh Circuit rule may reduce the number of instances where a terminated employee would be able to prove a viable claim, that reduction might be offset, if not exceeded, by the increased damages for which a former employer would be liable once the bomb "exploded." It would also be outweighed by the increased cost and complexity of litigating long after the fact the truth or falsity of the underlying charges and the extent to which the accusations had a causal role in a third party's decision to refuse employment.

III. THE FOURTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DUE PROCESS PRECEDENTS

A. There Is No Conflict Between The Fourth Circuit Decision And *Bishop* v. *Wood*

The assertion that the decision here conflicts with *Bishop* is, on its face, far-fetched. As petitioners must acknowledge, numerous federal and state decisions have carefully examined and applied *Bishop* and sustained due process claims that did not comport with petitioners' proposed "actual dissemination" limitation. Indeed, this Court has been presented with a number of opportunities to "correct" the widely prevailing

understanding of its precedent and has let such decisions stand. See, *e.g.*, *Cox* v. *Roskelley*, 359 F.3d 1105 (9th Cir.), cert. denied, 543 U.S. 924 (2004); *Donato* v. *Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623 (2d Cir. 1996), cert. denied, 519 U.S. 1150 (1997); see also *Olivieri* v. *Rodriguez*, 122 F.3d 406 (7th Cir. 1997), cert. denied, 522 U.S. 1110 (1998); *Copeland* v. *Philadelphia Police Dep't*, 840 F.2d 1139 (3d Cir. 1988), cert. denied, 490 U.S. 1004 (1989).

Of course, the Court in *Bishop* was not presented with, nor did it decide, the precise question presented here: whether an individual who is able to show that his ability to earn a living is impaired by his former employer's false and stigmatizing accusations must wait "[u]ntil the time bomb goes off," *Clark* v. *Maurer*, 824 F.2d 565, 567 (7th Cir. 1987), before obtaining the name-clearing hearing to which the Due Process Clause entitles him. But *Bishop* and the principles and precedents on which it relied strongly *support* the Fourth Circuit's conclusion. *Bishop* dealt with statements that had been made *privately* to the employee, concluding that these could not give rise to a procedural name-clearing right. 426 U.S. at 348. The Court reasoned that such communications – whether true or false, stigmatizing or not – had no "impact on [plaintiff's] reputation" and that the plaintiff "remain[ed] as free as before to seek another [job]." *Ibid.* (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 575 (1972)). It is wishful thinking on petitioners' part to claim that *Bishop* "made it unambiguously clear," Pet. 10, that an individual who shows that his former employer's false and stigmatizing reasons for dismissal will likely (or certainly) be made known to future employers must wait until the damage is done – "*actual* disclosure" – before seeking a name-clearing hearing. Recognizing that foreclosure of employment opportunity is the touchstone of the procedural right, the Court in *Bishop* held simply that the employer's private communication of accusations to the employee did not constitute the kind of public dissemination that would have

entitled him, as a matter of due process, to an opportunity to clear his name. See 426 U.S. at 348.

By examining whether the employer's practice impermissibly restricted the plaintiff's future employment, the Fourth Circuit correctly understood the teaching of *Bishop*. Indeed, the court of appeals, invoking *Bishop*'s concern that the Due Process Clause not be "'a guarantee against incorrect or ill-advised personnel decisions,'" *agreed with petitioners* that the "mere presence" of stigmatizing information in a personnel file would not in itself entitle an employee to a name-clearing opportunity. Pet. App. 9a (quoting 426 U.S. at 350). But the court rejected, as also inconsistent with *Bishop*, petitioners' proposed "actual dissemination" requirement because "[i]f a plaintiff must allege a specific instance of actual dissemination to a prospective employer, he would not be 'as free as before to seek another job.'" Pet. App. 10a (quoting *Bishop*, 426 U.S. at 348). After carefully examining both *Bishop* and the dissenting judge's objections, the Fourth Circuit concluded that the "likelihood" standard was most consistent with *Bishop*, because when "prospective employers are likely to see the stigmatizing allegations, an employee must choose between finding future employment and protecting his reputation by not applying for jobs." Pet. App. 10a.[4] That conclusion is entirely faithful to *Bishop*.

B. Petitioners' Proffered Limitation Is Wrong

Stripped of the claim of "conflict" with *Bishop*, petitioners' submission reduces to a plea that the Court should grant review here to adopt the "actual disclosure" limitation devised by the Seventh Circuit. In cases like *Olivieri*, *supra*, that court has held that, even where it is "highly likely that the

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[4] Because respondent's proposed amended complaint plainly satisfies the "likelihood" standard, this case does not present the question whether *Bishop* forecloses claims when public revelation is possible, but not likely.

ground of [the employee's] discharge would become known to prospective employers," he must wait for actual disclosure of the false and stigmatizing information before suing a former employer to enforce his name-clearing right. 122 F.3d at 408. As the Fourth Circuit recognized (as has nearly every other court that has considered the issue), it is this requirement that both departs from ordinary judicial norms and is especially inappropriate in light of the nature of the constitutional right at issue.

Requiring employees to wait until *after* "actual" dissemination makes no practical sense. It ensures that cases will come to court long after the central events in dispute (*e.g.*, those bearing on the truth or falsity of the allegations) and in a posture that makes litigation more complex and costly. Even more important, however, the Seventh Circuit rule fails to respect central aspects of the constitutional right at issue. First, the Seventh Circuit's rule ignores the *procedural* essence of the due process guarantee – *i.e.*, the requirement that the former employer afford a *process* whereby the discharged employee can disprove false charges becomes obviously inadequate if it is *only* available after a third party has been told the false information and the stigma has attached. Second, the liberty interest the procedure is meant to safeguard – the right to earn a living free of government interference – is one that can be infringed by both threatened (*i.e.*, "likely") and "actual" government acts. The dissent below notwithstanding, Pet. App. 23a, 32a-34a, there is simply nothing unusual in courts' acting to prevent "likely" injury from coming to pass. Claims like this one implicate the principle that probable (or certain) adverse government action can itself cause injury. See, *e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 153 (1967) ("where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts * * * must be permitted"); *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726,

734 (1998) (recognizing harm of being "force[d] * ** to modify * * * behavior in order to avoid future adverse consequences").

As the Fourth Circuit recognized, see Pet. App. 10a, the likelihood of disclosure itself injures falsely accused employees by discouraging them from seeking new employment. Indeed, it is hard to discern a constitutionally relevant difference between the injury suffered by an individual who knows that prospective employers will, upon his application, be notified of his former employer's false accusation – *i.e.*, this case – and one where they already have been notified. See *Roth*, 408 U.S. at 575 (liberty consists in the former employee's "remain[ing] as free as before to seek another" job).

The Seventh Circuit's "actual disclosure" cases have not seriously reckoned with these powerful constitutional and practical considerations, and that court's stated reasons for imposing the limitation defy common sense. Thus, while that court has described its rule as grounded on the "fundamental principle of mitigation of damages," *Olivieri*, 122 F.3d at 408, forcing individuals like respondent to sue only after dissemination has occurred guarantees that preventable (and compensable) damage will needlessly occur.[5] As a general matter, the mitigation principle could be expected to favor a rule that defuses ticking time bombs rather than waits for them to explode. Moreover, since the gravamen of the constitutional claim here is the ability to earn a living, the more promptly a plaintiff is able to vindicate that right, the

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[5] Whether the mitigation principle might apply in certain cases, *e.g.*, where a fired employee decides not to seek any further employment or when the employee gratuitously calls attention to some false accusation, it has no force in a case like this one, where it is the employer's actions – in firing the employee for false reasons and following a policy or practice of spreading the word to prospective employers – that are responsible for the individual's predicament.

smaller his damages are likely to be and the more readily a factfinder may evaluate his claims. See *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2171 (2007) (noting that "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened"); *id.* at 2171 n.4.

IV. THIS CASE'S INTERLOCUTORY POSTURE AND PRELIMINARY STATUS MAKE REVIEW BOTH UNNECESSARY AND IMPRUDENT

The decision petitioners ask the Court to review did not hold that Sciolino is entitled to relief on his due process claim, that he was entitled to proceed to trial, or even that his proposed amended complaint had definitively stated a claim on which relief could be granted. The issue presented to the Fourth Circuit – and resolved in Sciolino's favor – was whether the district court *erred in denying leave to file an amended complaint.* The Fourth Circuit held that it would not be "futile" to afford Sciolino an opportunity to show that disclosure of his former employer's false allegations was "likely," Pet. App. 13a, and remanded the case to the district court for further *pre-trial* proceedings. Indeed, the decision held open the possibility that petitioners might yet obtain a judgment on alternative grounds, recognizing that certain confusing and uncertain questions of fact and state law were best sorted out at the trial court level. This Court's usual practice is not to intervene in litigation at this very early stage, see R. Stern *et al.*, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002), and petitioners offer no compelling reason for deviating from this sound rule.

On the contrary, the concerns animating the practice of withholding review until final judgment are fully present here. As with all interlocutory appeals, certiorari petitions at the pleading stage threaten to multiply and protract the proceedings, requiring courts to devote scarce resources to

resolving issues that may ultimately be of no consequence to the disposition of the case before them – and to do so on records that are underdeveloped with respect to key factual or legal issues. See generally *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940) (explaining the policies militating against "piecemeal disposition on appeal of what for practical purposes is a single controversy").

Here, the proceedings have reached only the complaint stage, and, even apart from its doubtful significance for the federal courts generally, it is yet unclear that the constitutional issue petitioners ask the Court to decide immediately will be of concrete – let alone dispositive – significance *in this case*. For example, although the proposed amended complaint includes allegations that petitioners treat Sciolino's personnel file as a public record and are likely to disseminate the accusations to his prospective employers, no discovery has yet been conducted. The record is thus silent as to whether and to whom the City has *already* communicated the accusations. Were discovery to disclose that such communications had, in fact, occurred, even the restrictive rule of law petitioners urge would be satisfied.

At the same time, the Fourth Circuit's legal standard will have actual significance in this case only if Sciolino is able to carry his burden on all the other issues – *e.g.*, that the allegations were false and that he did not, in fact, have a sufficient opportunity to clear his name. Indeed, *petitioners* have insisted (and remain free to urge on remand) that there are other independent legal grounds entitling them to judgment.[6] Moreover, unlike cases where a petitioner would

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[6] Petitioners acknowledge that the case could be resolved on remand without the district court ever reaching the dissemination issue, were it to accept their argument that Sciolino received a constitutionally sufficient name clearing opportunity. Pet. 8 n.1. This issue was briefed in the Fourth Circuit, see Appellee's C.A. Br. 22-24, but that court concluded that the factual record was insufficiently developed to decide it. Pet. App. 4a n.1.

suffer some unusual impending consequence in the absence of this Court's immediate intervention, the effect of the Fourth Circuit's decision is merely to require the City to re-file its motions in the district court and defend a relatively straightforward civil lawsuit.

Finally, this case is in significant ways less legally straightforward than a mine-run pretrial dismissal. Most notably, issues central to the dispute are bound up with unresolved questions of state law. Thus, the district court – at *petitioners'* urging – understood the Virginia Government Data Collection and Dissemination Practices Act, Va. Code Ann. §§ 2.2-3800 *et seq.* (2005), to prevent disclosure of Sciolino's personnel files, Pet. App. 46a-47a, an interpretation the Fourth Circuit questioned, see Pet. App. 6a n.3.[7] If, after further development of the record, the district court's initial understanding of this state-law question were to prove correct, that could affect Sciolino's ability to meet the Fourth Circuit's "likelihood" standard (and might render the Fourth Circuit's choice among standards academic).

Thus, even if there were merit to petitioners' claims that the issue they raise warrants this Court's review, there are distinct reasons why the Court should not take it up in such a preliminary and awkward procedural posture. If, as petitioners assert, the issue is a recurring one, there will be other cases presenting the issue on more fully developed records. See, *e.g.*, *Olivieri* v. *Rodriguez*, 122 F.3d 406 (7th Cir. 1997) (affirming grant of summary judgment for defendant), cert. denied, 522 U.S. 1110 (1998); *Cox* v. *Roskelley*, 359 F.3d 1105 (9th Cir.) (affirming summary judgment grant for

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[7] Indeed, the courts below have had great difficulty pinning down the City's own account of its pertinent policies and practices. The Fourth Circuit determined, at a minimum, that Newport News admitted both that it is "legally authorized to share personnel files with prospective employers" and that "it is its practice to do so in some circumstances." Pet. App. 6a n.3.

plaintiff), cert. denied, 543 U.S. 924 (2004). Denying review now would not preclude the petitioners here from seeking review if and when a final judgment in this case may be entered against them. See Stern *et al.*, *supra*, § 4.18, at 260. Without a more fully developed record, the Court would be poorly positioned to resolve the issue, especially in a case that already has at its center awkward and uncertain questions of state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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